Supreme Court, U.S.
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No. 95-1144

In the Supreme Court of the United States

OCTOBER TERM, 1995

MANFRED DEREWAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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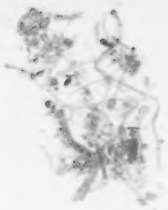
18 pp

QUESTIONS PRESENTED

1. Whether, under the now-repealed Federal Probation Act, the district court had authority to revoke petitioner's probation based on misconduct that occurred while petitioner was on parole before commencement of his scheduled term of probation.

2. Whether the district court erred in declining to require that a probation officer's entire file be disclosed in discovery at a probation revocation hearing.

3. Whether the conditions of petitioner's probation were modified without a hearing in violation of Fed. R. Crim. P. 32.1(b) based on the fact that the wording in the judgment and commitment order regarding the conditions of probation was slightly different from the wording in the form petitioner signed when he was released from prison.



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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-12a) is reported at 66 F.3d 52.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on September 15, 1995. A petition for rehearing was denied on October 16, 1995. Pet. App. 1a. The petition for a writ of certiorari was filed on January 16, 1996 (a Tuesday following a legal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was sentenced to a term of imprisonment to be followed by a term of special parole, to be followed by a term of probation. After serving approximately four years of his term of imprisonment in prison, petitioner was granted regular parole for the remainder of that imprisonment term. While serving his regular parole term, petitioner was found by the district court to have violated the conditions of his probation. The court revoked petitioner's probationary sentence and imposed a sentence of 36 months' imprisonment. The court of appeals affirmed.

1. In 1988, petitioner was convicted in the United States District Court for the Eastern District of Pennsylvania of conspiracy to import Phenyl-2-Propanone (P2P), in violation of 21 U.S.C. 963; importation of P2P, in violation of 21 U.S.C. 952(a); and attempt to import P2P, in violation of 21 U.S.C. 963. He was sentenced to five years' imprisonment on the conspiracy count and five years' imprisonment on the importation count followed by ten years' special parole, with the two sentences to run consecutively. Imposition of a prison sentence on the third count was suspended and petitioner was sentenced to probation for five years, with that probation sentence to commence at the expiration of the sentences imposed under the other two counts. Pet. App. 25a-26a; *United States* v. *DeRewal*, 10 F.3d 100, 102 (3d Cir. 1993), cert. denied, 114 S. Ct. 1544 (1994). The offense for which petitioner received probation was committed before November 1, 1987. Gov't C.A. Br. 22 n.7. Therefore, the probation was imposed under the Federal Probation Act (FPA), 18 U.S.C. 3651, which was repealed by the Comprehensive Crime Control Act of

1986, Pub. L. No. 98-473, §§ 212(a)(1) and (2), 235(a)(1), 98 Stat. 1987, 2031, as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728, effective date November 1, 1987, and replaced by 18 U.S.C. 3561, 3566.

On December 17, 1992, petitioner was granted parole from his ten-year imprisonment term, with his parole scheduled to expire at the end of the ten years, *i.e.*, on October 18, 1998. Petitioner's ten-year special parole term would then commence. After completion of special parole, petitioner's five-year term of probation would begin. Pet. App. 4a-5a.

2. While petitioner was serving the regular parole on his initial imprisonment term, the United States Probation Department charged petitioner on September 7, 1994, with having violated the conditions of his probation because he had not responded truthfully to inquiries by his probation officer, had not followed the officer's instructions, had associated with persons known to be engaged in criminal activity or known to have been convicted of a felony, and had violated the law. Pet. App. 5a; Pet. 14. The charges were, in part, based on the discovery of petitioner, during the execution of a search warrant by the Federal Bureau of Investigation and the Drug Enforcement Administration at petitioner's residence, in the company of a person he knew to be a convicted felon. Pet. App. 16a. The charges were also based on information obtained from one of petitioner's neighbors who overheard petitioner's telephone conversations as a result of an illegal splice petitioner had made into her telephone line. *Id.* at 5a, 17a. The conversations included statements by petitioner instructing a woman to cash in his "CD's" held in other people's names in Costa Rica and not to use U.S. Currency to avoid trouble. *Id.* at 19a. Petitioner had been fined $30,000 as part of his

sentence, but, when he was released, petitioner swore that he had no property exceeding twenty dollars and had told his probation officer that he had no assets. *Ibid.*

Petitioner claimed that the court lacked jurisdiction to revoke his probation because his term of probation had not yet commenced. He relied on a Fifth Circuit opinion, *United States* v. *Wright*, 744 F.2d 1127 (1955), which had interpreted the opinion in *Affronti* v. *United States*, 350 U.S. 79 (1955), as prohibiting an overlap between probation provisions and the parole or executive clemency powers of the Executive Branch. Pet. App. 22a-23a. The district court disagreed. It concluded that the Third Circuit, in *United States* v. *Camarata*, 828 F.2d 974 (1987), cert. denied, 484 U.S. 1069 (1988), had explained that *Affronti* did not deal with the situation presented here where the court is revoking probation instead of granting it. Pet. App. 23a-24.

At the hearing on revocation of probation, petitioner moved for disclosure of his entire probation file. The court denied that motion. Pet. App. 5a. Petitioner also contended that the conditions of his probation had been modified previously without the procedural rights provided by Federal Rule of Criminal Procedure 32.1. The court rejected the contention, concluding that the alteration in the description of the conditions to which petitioner pointed merely clarified the conditions and did not make a substantive change. Pet. App. 19a-20a.

The government's evidence at the hearing focused on testimony by petitioner's neighbor about the telephone calls, and also included testimony by telephone employees, petitioner's probation officer, and FBI agents. Pet. App. 5a. After the hearing, the court

concluded that petitioner had violated his probation because he had been untruthful to his probation officer about travel plans and financial assets he owned, and had violated 18 U.S.C. 1001 by making false statements about his financial assets to the officer and in an oath he took upon his release from prison. Pet. App. 20a. The court also found that the evidence established that petitioner had been associating with a person he knew to be a convicted felon in violation of his probation conditions. *Ibid.* Finally, the court concluded that petitioner engaged in criminal conduct in violation of his probation conditions when he arranged for a telephone to be illegally connected to his residence. *Ibid.* The court revoked petitioner's probation and sentenced him to 36 months' imprisonment. *Id.* at 5a.

3. The court of appeals affirmed. Pet. App. 1a-12a. The court rejected petitioner's contention that the district court did not have the authority to revoke his probation because he had not yet started serving that probation sentence and was still serving the parole granted him by the Executive Branch. *Id.* at 6a-10a. The court concluded that "such judicial action regarding probation does not disturb the executive branch's authority to control [petitioner's] parole." *Id.* at 4a. The court relied on *United States* v. *Williams*, 15 F.3d 1356 (6th Cir.), cert. denied, 115 S.Ct. 431 (1994), in which the court held that "a district court does have authority to revoke probation for pre-probation conduct, including the pre-probation conduct of a paroled convict." Pet. App. 6a, quoting *Williams*, 15 F.3d at 1357. The court agreed with *Williams* that 18 U.S.C. 3651 authorized the revocation. Pet. App. 6a.

The court also agreed with *Williams* that allowing a court to revoke probation for pre-probation conduct would not unduly interfere with Executive Branch administration of a convict's custodial sentence or violate the separation of powers. The court, as did *Williams*, distinguished *Affronti* v. *United States*, *supra*, in which this Court held that once a defendant begins to serve the first in a series of consecutive custodial sentences, a court may not change a subsequent custodial sentence to a probation sentence. Pet. App. 6a-10. The *Affronti* Court had reasoned that "the probationary power ceases with respect to all of the sentences composing a single cumulative sentence immediately upon imprisonment for any part of the cumulative sentence." *Id.* at 6a, quoting *Affronti*, 350 U.S. at 83. The *Affronti* Court had concluded that, otherwise, a change from a sentence of imprisonment to a sentence of probation would interfere with the Executive's parole and clemency power. Pet. App. 7a, quoting *Williams*, 15 F.3d at 1362. The *Williams* court explained, however, that the *Affronti* reasoning does not apply in the reverse situation, *i.e.*, where a probationary sentence is changed into a custodial sentence. The court pointed out that "[t]he possibility that a probationary sentence would be converted into a custodial sentence is inherent in the very notion of probation. Furthermore, the conversion * * * still leaves the executive free to administer the converted sentence." Pet. App. 7a, quoting *Williams*, 15 F.3d at 1363-1364.

The court of appeals acknowledged, as did the court in *Williams*, that petitioner's position had been accepted by the Fifth Circuit in *United States* v. *Wright*, *supra*. Pet. App. 8a. The court noted that the Third Circuit already had expressed criticism of

the *Wright* case, however, in its own earlier opinion in which it had expressly reserved ruling on the issue now presented. Pet. App. 3a, 9a, citing *United States* v. *Camarata*, *supra*. Reaching the issue reserved in *Camarata*, the court of appeals concluded that "*Affronti* was misapplied in *United States* v. *Wright* and should not be read to prohibit the district court from revoking probation based on pre-probationary conduct." Pet. App. 9a-10a.

The court also rejected petitioner's argument that the conditions of his probation had been modified in violation of Federal Rule of Criminal Procedure 32.1(b).[1] Petitioner noted that the language in his judgment and commitment order regarding his obligations to associate "only with law-abiding persons" and "follow the probation officer's instructions" differed from the language in the form he signed for his probation officer that directed him not to associate "with any persons engaged in criminal activity" or "with any persons convicted of a felony unless granted permission to do so by the probation officer." Pet. App. 10a. The court found, however, that the differences in wording were "insignificant" and concluded that "[a]ny violation of the second version would certainly have contravened the first version as well." *Ibid.* It agreed with the district court that the language had merely been clarified and that the conditions had not been substantively changed. *Id.* at 10a-11a.

Turning to petitioner's argument that he was entitled to complete disclosure of his probation file, the

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[1] Rule 32.1 sets forth the procedures for revocation and modification of probation or supervised release which include provision of a hearing and counsel.

court noted that Federal Rule of Criminal Procedure 32.1(a)(2)(B) provides that a defendant is entitled to disclosure of the evidence against him at a probation revocation hearing. Pet. App. 11a. The court reasoned, however, that the rule cannot reasonably be read to require automatic production of a probation officer's entire file even if the officer is a witness. *Ibid.* The court concluded that the district court had not erred because petitioner had been provided with relevant documents from the file and the district court had protected petitioner's rights further by examining the rest of the file in camera. *Ibid.* The court also rejected petitioner's challenge to the sufficiency of the evidence against him. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 17-23) that the district court lacked jurisdiction to revoke his federal probation for misconduct committed while he was on parole. The court of appeals correctly resolved that question.

a. Section 3651 provided: "[t]he court may revoke or modify any condition of probation, or may change the period of probation." 18 U.S.C. 3651 (1982). The court of appeals correctly held that the district court had authority to revoke petitioner's probation for a pre-probation offense under former 18 U.S.C. 3651. That result is consistent with the statutory text as well as the purposes of the statute. The probation statute "was designed to provide a period of grace in order to aid in the rehabilitation of a penitent offender." *Burns* v. *United States*, 287 U.S. 216, 220 (1932). The provisions of the statute were adapted to the end of "individualiz[ing] each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would

be possible only in the exercise of a broad discretion." *Ibid.* This Court has recognized that, "[t]o accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential." *Ibid.* Foreclosing the courts from revoking probation based on a pre-probation offense would provide the defendant with a grace period in which his misconduct could not affect his probationary release into society. That result would be at odds with the congressional goal of flexibility and the principle that probation is designed to give offenders an opportunity to demonstrate that they do not pose a risk of recidivism.

Petitioner's reliance (Pet. 17-18) on *United States* v. *Murray*, 275 U.S. 347 (1928), and *Affronti* v. *United States*, 350 U.S. 79 (1955), is misplaced. In *Murray*, the Court held that district courts lacked authority to suspend a sentence and grant probation after service of the sentence had begun. 275 U.S. at 356-359. In *Affronti*, the Court extended *Murray* to hold that district courts had no power to suspend any of a series of consecutive sentences and grant probation after the defendant had begun to serve the first of the consecutive sentences. 350 U.S. at 83-84. In both cases, the Court stated that the probation statute should be construed to "avoid interference with the parole and clemency powers vested in the Executive Branch." 350 U.S. at 83; see also 275 U.S. at 357. Both *Murray* and *Affronti* limited the ability of the lower courts to mitigate sentences once the defendant became subject to the Executive's parole and clemency powers.

The rationale underlying *Murray* and *Affronti* does not apply to petitioner's case. *Murray* and *Affronti* addressed only the concerns underlying a grant of probation—the release of an incarcerated

prisoner already in the custody and under the supervision of the Bureau of Prisons. The *Affronti* Court stressed that it was "concerned with the power to grant suspension of sentences," 350 U.S. at 81, not the power to revoke probation. And the *Murray* Court examined only "whether there [was] any power in the federal courts * * * to grant probation under the Probation Act, after the defendant ha[d] served any part of his sentence." 275 U.S. at 352.

In *Murray* and *Affronti*, the Court did not address the very different situation presented by the revocation of probation, which results in the incarceration of a person not then in custody. The revocation of probation does not result in any conflict with the Executive's parole and clemency authority. Unlike a grant of probation, a revocation of probation does not free the defendant at a time that the parole and prison officials may consider inappropriate. Rather, it results in a term of incarceration that the parole authorities may then adjust.

Petitioner seeks to distinguish (Pet. 19, 20-23) *United States* v. *Williams*, *supra*, on the ground that the petitioner in that case had completed parole and his probation was revoked while he was in his probationary period. The critical aspect of *Williams*, however, is that the misconduct for which probation was revoked occurred while the petitioner in *Williams* was on parole. The holding in *Williams* that revocation for that misconduct was permissible establishes that parole authorities do not have the exclusive authority to consider how a convict behaves while on parole. The sentencing court may also, under *Williams*, take account of misconduct committed while the convict was on parole. If petitioner were correct that *Williams* turned only on the timing

of the revocation itself, the district court could revoke probation based on misconduct committed while the defendant was on parole, but the court would have to await the first day of the probationary period to issue its revocation order. Neither *Williams* nor the probation statute, however, requires that result.

b. Petitioner is correct (Pet. 17, 19) that the holding in this case and *Williams* conflicts with the Fifth Circuit's decision in *United States* v. *Wright*, 744 F.2d 1127 (1984). As the courts of appeals here and in *Williams* correctly reasoned, however, *Wright* misinterpreted *Affronti*. As explained above, the concerns expressed in *Affronti* were triggered by the grant of probation to a convict on parole (*i.e.*, the release of a convict that the parole authorities believed should be confined), not the confinement of a convict, whom the parole authorities then may determine should be released again on parole or retained in confinement.[2]

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[2] The other cases petitioner claims to be in conflict with the court of appeals' decision in the instant case (Pet. 20) do not in fact present any conflict. All the cases hold that the district court has authority to revoke probation. See *United States* v. *King*, 990 F.2d 190 (5th Cir.) (authority to revoke probation based on conduct committed while on current parole and probation), cert. denied, 114 S. Ct. 223 (1993); *United States* v. *Fryar*, 920 F.2d 252 (5th Cir. 1990) (authority to revoke probation based on conduct committed after sentencing and before the start of probation), cert. denied, 449 U.S. 981 (1991); *United States* v. *Johnson*, 892 F.2d 369 (4th Cir. 1989) (authority to revoke probation based on conduct committed after sentencing and before the start of probation); *United States* v. *James*, 848 F.2d 160 (11th Cir. 1988) (authority to revoke probation based on conduct committed after conviction but before sentencing); *United States* v. *Daly*, 839 F.2d 598 (9th Cir. 1988) (authority to revoke probation based on conduct committed after sentenc-

Review by this Court is not warranted, however, because the statute that governs petitioner's case, the Federal Probation Act, 18 U.S.C. 3651-3656, was repealed by Congress when it enacted the Comprehensive Crime Control Act of 1984. See Comprehensive Crime Control Act of 1986, Pub. L. No. 98-473, §§ 212(a)(1) and (2), 235(a)(1), 98 Stat. 1987, 1995, 2031, as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728, codified in 18 U.S.C. 3565(a)(2). Section 3565 of the new statute states that "[i]f the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may * * * revoke the sentence of probation * * *." That provision clearly permits revocation of probation for acts committed before the commencement of the probationary term. See *United States* v. *Yancey*, 827 F.2d 83, 87-88 (7th Cir. 1987), cert. denied, 485 U.S. 967 (1988); *United States* v. *Veatch*, 792 F.2d 48, 51 (3d Cir.), cert. denied, 479 U.S. 933 (1986). Accordingly, the issue presented by petitioner is of

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ing but before the start of probation); *United States* v. *Camarata*, 828 F.2d 974 (3d Cir. 1987) (authority to revoke probation based on conduct committed during incarceration before the start of probation), cert. denied, 484 U.S. 1069 (1988); *United States* v. *Davis*, 828 F.2d 968 (3d Cir. 1987) (same), cert. denied, 484 U.S. 1069 (1988); *United States* v. *Yancey*, 827 F.2d 83 (7th Cir. 1987) (authority to revoke probation based on conduct committed after sentencing and before the start of probation), cert. denied, 485 U.S. 967 (1988); *United States* v. *Veatch*, 792 F.2d 48 (3d Cir.) (authority to revoke probation based on conduct committed after sentencing and before incarceration or the start of probation), cert. denied, 479 U.S. 933 (1986); *United States* v. *Ross*, 503 F.2d 940 (5th Cir. 1974) (authority to revoke probation based on conduct committed after sentencing and before incarceration or the start of probation).

rapidly diminishing importance and does not merit further review.

2. Petitioner maintains (Pet. 23-25) that the denial of access to his full probation file violated Federal Rule of Criminal Procedure 26.2(a) and denied him due process. Rule 26.2 incorporates the requirements of the Jencks Act (18 U.S.C. 3500) that a defendant is entitled to see a witness's statement after he has testified for the government. That rule is made applicable to probation-revocation hearings by Fed. R. Crim. P. 32.1(c)(1). In addition, Rule 32.1(b)(2)(B) requires "disclosure of the evidence against the person" who is subject to the violation proceeding.

The court of appeals held that petitioner "was provided with relevant documents from the file and was further protected by the district court's in camera review." Pet. App. 11a. The court further ruled that "the district court did not err in refusing to order the production of the probation officer's entire file." *Ibid.* Petitioner claims (Pet. 24-25) that there were in fact statements of the probation officer in his file that should have been, but were not, disclosed under Rules 32.1 and 26.2. He claims (Pet. 24) that the district court did not fully examine the entire file for such statements. There is no basis in the record to support petitioner's factual claims. In any event, such a factual dispute does not warrant review by this Court.

3. Finally, petitioner argues (Pet. 26-28) that the differences in wording between the conditions of his probation specified in the judgment and commitment order and those specified in the administrative document he signed when he was released on parole constituted an administrative "modification" of the condi-

tions of his probation, without the hearing required by Federal Rule of Criminal Procedure 32.1(b).

The courts below correctly resolved the issue, concluding that the differences in wording were "insignificant" and that "[a]ny violation of the second version would certainly have contravened the first version as well." Pet. App. 10a. Since there was no "modification" of his conditions of probation, the procedural requirements of Rule 32.1 were not triggered. There is no warrant for this Court's review of the fact-based resolution of that contention by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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